

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANGIE M. ENSLEY,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

NO. C2:14-CV-0240-MJP-JLW

REPORT AND
RECOMMENDATION

BASIC DATA

Type of benefits sought:

() Disability Insurance

(X) Supplemental Security Income

Plaintiff's:

Sex: Female

Age: 35 at alleged onset date, 37 at ALJ hearing

Principal Disabilities Alleged by Plaintiff: bipolar disorder, borderline personality disorder, generalized anxiety disorder, obesity, and mild spondylosis of the lumbar spine.

Disability Allegedly Began: November 1, 2007

Principal Previous Work Experience: customer service clerk, cashier, driver, retail sales clerk

Last worked: 2010

Education Level Achieved by Plaintiff: did not finish high school or GED

PROCEDURAL HISTORY – ADMINISTRATIVE

Before ALJ Ilene Sloan:

Date of Hearing: January 9, 2013, hearing transcript AR 33-65

Date of Decision: February 27, 2013

Appears in Record at: AR 16-28

Summary of Decision:

Claimant has not engaged in substantial gainful activity since her alleged onset date; she has severe impairments of bipolar disorder, borderline personality disorder, generalized anxiety disorder, obesity, and mild spondylosis of the lumbar spine. She has nonsevere impairments of asthma, substance abuse in remission, Bell's Palsy, borderline hypertension, and porphyria. Her impairments, even in combination, do not qualify under the Listings. As to claimant's credibility, the ALJ concluded the symptom severity she alleges is not supported by the evidence, based on her medical records and activities.

She has the RFC to perform medium work, subject to certain limitations. She can understand, remember and carry out unskilled work that is routine. She is able to work in the proximity of co-workers, but cannot perform tandem tasks, or tasks involving a cooperative team effort. She cannot have contact with the general public.

She cannot perform any of her past relevant work. The testimony of the vocational expert identified examples of three jobs she can perform: forest products gatherer, janitor, and laundry worker. This establishes she can perform substantial work which exists in the national economy and requires a finding of "not disabled."

Before Appeals Council:

Date of Decision: December 20, 2013

Appears in Record at: AR 1-5

Summary of Decision: declined review

PROCEDURAL HISTORY – THIS COURT

Jurisdiction based upon: 42 U.S.C. § 405(g)

Brief on Merits Submitted by (X) Plaintiff (X) Commissioner

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

(X) Reverse and remand with instructions for further proceedings.

EVALUATING DISABILITY

The claimant, Ms. Ensley, bears the burden of proving she is disabled within the meaning of the Social Security Act (the “Act”). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (internal citations omitted). The Act defines disability as the “inability to engage in any substantial gainful activity” due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments are of such severity that she is unable to do his previous work, and cannot, considering her age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

The Commissioner has established a five-step sequential evaluation process for determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§ 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At step five, the burden shifts to the Commissioner. *See Valentine v. Comm’r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009).

ISSUES ON APPEAL

1. Did the ALJ err in assessing Plaintiff’s credibility?
2. Did the ALJ err in assessing medical evidence?

Dkt. No. 20.

DISCUSSION

Plaintiff’s Credibility Regarding Her Symptom Severity

The ALJ determined the symptom severity Plaintiff alleges is not supported by the evidence. AR 22. Plaintiff does not dispute the accuracy of specific findings but alleges the

1 ALJ's selective summary of the record does not fully reflect her impairments. Absent
2 evidence of malingering, an ALJ must provide clear and convincing reasons to reject a
3 claimant's testimony about the severity of her symptoms. *See Lingenfelter v. Astrue*, 504 F.3d
4 1028, 1036 (9th Cir. 2007). "General findings are insufficient; rather, the ALJ must identify
5 what testimony is not credible and what evidence undermines the claimant's complaints."
6 *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

7 Here, the ALJ cites no evidence of malingering; therefore the clear and convincing
8 standard applies. The ALJ provides a detailed report of Plaintiff's reduced credibility
9 regarding the severity of her symptoms, supported by a list of reasons. This court finds the
10 ALJ's first three reasons are clear, convincing, and supported by substantial evidence. The
11 ALJ's other reasons are less convincing, specifically that: financial issues and situational
12 stressors are the source of Plaintiff's anxiety, she reports being depressed for years while able
13 to work, she continues to smoke despite providers counseling her to quit, and that Plaintiff has
14 not consistently sought mental health counseling. AR 23.

15 Regardless, three of the ALJ's reasons are sufficient to find reduced credibility is
16 based on substantial evidence and not in error: (1) the severity of Plaintiff's alleged mental
17 limitations are inconsistent with clinical findings. AR 22. (2) Physical examination findings
18 are relatively unremarkable. AR 23. (3) Inconsistencies in the record detract from Plaintiff's
19 credibility. AR 23.

20 First, regarding Plaintiff's alleged mental limitations, the ALJ points to a list of
21 relatively mild and moderate findings. AR 22. Plaintiff does not dispute these findings but
22 points to other clinical findings that show her difficulty. However, the records Plaintiff cites
23 demonstrate no overall findings significantly more severe than those the ALJ cited. *See*
24 Plaintiff's Opening Brief at 4-5; Plaintiff's Reply at 2-4. Although providers find Plaintiff has

1 anxiety and coping problems, the ALJ's finding that she has adequate cognitive skills for
2 simple work and that her moods are sufficiently stable with medication is also based on
3 substantial evidence. AR 266, 339. Plaintiff testified that she is able to focus better when she
4 takes her medication. AR 49. An ALJ properly considers a claimant's favorable response to
5 treatment. *Tommasetti v. Astrue*, 533 F.3d. 1035, 1039-40 (9th Cir. 2008).

6 Second, the ALJ finds her physical examination findings are relatively unremarkable,
7 citing normal examination results and instances of only mild problems with her back. AR 23.
8 Again, Plaintiff does not dispute this but asserts that her obesity compounds her physical
9 problems. However, Plaintiff does not point to any evidence of severe physical limitations, or
10 opinions of such by any medical provider. Contradiction with medical records is sufficient to
11 reject subjective testimony. *See Carmickle v. Comm'r.*, 533 F.3d 1155, 1161 (9th Cir. 2008).

12 Third, the ALJ finds inconsistencies in the record detract from Plaintiff's credibility.
13 AR 23. In support, the ALJ cites activities of Plaintiff's daily living including some social
14 activities with her family, including her children and their father. Plaintiff testified to visiting a
15 family campsite with her children during the summer of 2012. AR 53. Plaintiff plays
16 gambling games online, attends church, and goes to coffee and restaurants with friends and
17 family. Plaintiff argues these activities do not show she can perform full time work. Contrary
18 to Plaintiff's assertion, the ALJ is not required to show the activities equate to the ability to
19 work, and this is not the reason the ALJ cited. The ALJ found the activities contradict
20 Plaintiff's allegations of significant anxiety and difficulty dealing with others. This is a
21 permissible consideration. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (ALJ properly
22 considers claimant's activities that contradict claimant's testimony in making adverse
23 credibility determination).

1 The ALJ provides at least three reasons for discounting her alleged symptom severity
2 that are clear, convincing and based on substantial evidence. Plaintiff takes a different reading
3 of particular evidence but does not demonstrate the ALJ's conclusion is in error. Even
4 considering the evidence Plaintiff argues does not undermine the ALJ's conclusion here.

5 ***The ALJ Erred in Weighing the Medical Opinion Evidence***

6 Plaintiff asserts the ALJ erred in discounting the opinions of examining psychologists,
7 Drs. Schimmel, Johansen, and Harmon, and that her resulting RFC is not based on substantial
8 evidence. If the ALJ rejects a treating or examining physician's opinion that is contradicted by
9 another doctor, he must provide specific, legitimate reasons based on substantial evidence in
10 the record. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995); *Valentine v. Comm'r of Soc.*
11 *Sec. Admin.*, 574 F.3d 685, 692 (9th Cir. 2009). Here, the opinions of the three examining
12 psychiatrists are contradicted in part by the opinions of the two nonexamining, state agency
13 psychological consultants, Drs. Bailey and Donohue, who found Plaintiff able to do some
14 work. AR 24. Thus, the ALJ is required to provide "specific and legitimate" reasons based on
15 substantial evidence in the record for rejecting the opinions of Drs. Schimmel, Johansen, and
16 Harmon.

17 **Consulting Psychological Examiner, Dr. Don Schimmel, Ph.D.**

18 The ALJ dismissed Dr. Schimmel's April 2009 opinion in its entirety, reasoning: "No
19 weight is assigned to the consultative DSHS evaluation by Dr. Schimmel, as this was
20 previously considered in the final reconsideration determination." AR 25 citing 307-10. Thus,
21 the ALJ's clear, singular reason for giving no credit to the opinions of this examining
22 psychiatrist is that they were previously considered by the Commissioner in making a final
23 determination of a prior application. Defendant cites and this court does not find any authority
24 indicating this is a legally sufficient reason to disregard Plaintiff's medical evidence,

1 particularly that of an examining provider who had occasion to evaluate her symptoms in
2 person. It appears that Plaintiff made a prior application for SSI benefits, and Dr. Schimmel's
3 report was part of the record. But there is no indication the Commissioner made any
4 evalutaion at that time as to the merits of Dr. Schimmel's opinions. The prior application was
5 dismissed when Plaintiff did not appear for a scheduled hearing. The court therefore perceives
6 no validity to the reason assigned by the ALJ for ignoring Dr. Schimmel's opinions in
7 connection with this application. Instead, the Commissioner now asserts the rejection of Dr.
8 Schimmel's opinions was proper because (1) Dr. Schimmel's opinion is a dispositive disability
9 finding reserved for the Commissioner; and (2) because it was based primarily on Plaintiff's
10 subjective symptoms (which, Defendant argues, was relied upon by Drs. Johansen and
11 Harmon, opinions the ALJ dismissed for being overly based on Plaintiff's discredited
12 subjective symptoms). Regardless of whether they are true, neither of these reasons was given
13 by the ALJ. District courts are emphatically not permitted to rely upon *post hoc*
14 rationalizations of the ALJ's decision. *Bray v. Commissioner of SSA*, 554 F.3d 1219, 1225-26
15 (9th Cir. 2009).

16 Dr. Schimmel's opinion is also of significance in this case because, in discounting the
17 opinions of Drs. Johansen and Harmon, the ALJ gives them "little weight" reasoning that the
18 doctors only reviewed previous DSHS evaluations "which also only rely on the claimant's
19 subjective reports." AR 24, 25. In so doing, the ALJ does not specifically name Dr.
20 Schimmel, but Drs. Johansen and Harmon do, and the record reflects that Dr. Schimmel's was
21 the only other DSHS physician opinion in Plaintiff's record at that time. Thus, much of the
22 ALJ's reasoning for discounting the opinions of Drs. Johansen and Harmon are because they
23 relied on Dr. Schimmel's opinion.

1 After conducting a mental status examination and clinical interview, Dr. Schimmel
2 opined Plaintiff would be unable to work. Dr. Schimmel reported Plaintiff is “significantly
3 impaired” and therefore “unemployable in any capacity.” He believed Plaintiff’s incapacity
4 would continue for at least twelve months, “though more likely indefinitely.” Dr. Schimmel
5 further noted that although “mental health treatment and medication management might help
6 her stabilize, they are unlikely to affect her long-term prospects for returning to work.” AR
7 310. Dr. Schimmel comments on Plaintiff’s mental health treatment and response to
8 medication, issues that are central to Plaintiff’s case. The ALJ is therefore required to provide
9 specific and legitimate findings based on substantial evidence in the record regarding this
10 opinion, unless corresponding limitations are incorporated into Plaintiff’s RFC. They were
11 not. Remand to the Commissioner is therefore necessary so that the ALJ can make specific
12 and legitimate findings based on substantial evidence in the record regarding Dr. Schimmel’s
13 opinion.

14 **Consulting Psychological Examiners, Steve Johansen, Ph.D., and Dana Harmon,**
15 **Ph.D.**

16 Dr. Johansen performed a psychological examination of Plaintiff in March 2010 (AR
17 311-17), finding marked limitations in her ability to perform certain work-related activities
18 including the ability to initiate/complete tasks, maintain appropriate work behavior, and
19 respond appropriately to the pressures/pace of a work environment. Dr. Johansen noted he
20 reviewed Dr. Schimmel’s 2009 opinion. Dr. Johansen concluded Plaintiff’s limitations would
21 persist longer than twelve months. AR 311, 313, 316. The ALJ gave “little weight” to Dr.
22 Johansen’s opinion, reasoning he relies too heavily on the claimant’s subjective complaints “as
23 he only relies on previous DSHS evaluations (which also only rely on the claimant’s subjective
24 complaints).” The ALJ also noted that Dr. Johansen’s testing showed Plaintiff has fairly

1 normal cognitive ability and thought processes, that Dr. Johansen's medical source statement
2 provided little information regarding Plaintiff's ability to function in a workplace setting, and
3 that Dr. Johansen's report is highly inconsistent with Plaintiff's reported activities. AR 25.

4 Similarly, Dr. Harmon performed a psychological examination of Plaintiff in February
5 2012 (AR 318-29), finding marked limitations in her ability to perform in eight categories of
6 work-related activities and severe limitations in her ability to communicate and perform
7 effectively in a work setting with public contact. AR 322. Dr. Harmon noted she reviewed Dr.
8 Schimmel's 2009 opinion and Dr. Johansen's 2010 opinion. AR 318. Dr. Harmon opined
9 Plaintiff did not seem able to maintain sustained, gainful employment, and that the goals of her
10 treatment should be focused on stabilization and minimizing further psychiatric crises and
11 hospitalizations. AR 320. The ALJ dismissed Dr. Harmon's opinion for much of the same
12 reasons as he dismissed Dr. Johansen's opinion, particularly that "she relied heavily on
13 claimant's subjective complaints as she reviewed no other records outside of previous DSHS
14 evaluations (which also rely on the claimant's subjective reports)."

15 An ALJ may reject a doctor's opinion that is premised on a claimant's subjective
16 complaints that the ALJ has properly discounted as not credible. *See Bray v. Comm'r. SSA*,
17 554 F.3d 1219, 1228 (9th Cir. 2009); *Tommasetti v. Astrue*, 533 F.3d. 1035, 1041 (9th Cir.
18 2008). However, as the ALJ reasons, Dr. Schimmel's opinion is central to the opinions of Drs.
19 Johansen and Harmon. But Dr. Schimmel's opinions were not validly dismissed. The ALJ did
20 not include any analysis as to the substance of Dr. Schimmel's opinion, and based rejection of
21 the subsequent examining doctors' opinions largely on their reliance of Dr. Schimmel's
22 evaluation. The ALJ's rejection of the opinions of Drs. Johansen and Harmon are therefore not
23 based on substantial evidence and is in error.

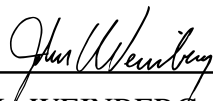
On remand the ALJ should first thoroughly analyze and assign weight to Dr. Schimmel's opinion. Then, the ALJ should reassess the opinions of Drs. Johansen and Harmon, specifically analyzing what impact Dr. Schimmel's opinion has on them. If the ALJ again attaches little or no weight to the opinions of one or more of these physicians, the ALJ must state legally valid reasons for doing so. If the ALJ attaches significant weight to one or more of them, the ALJ should re-determine Plaintiff's RFC, and, if necessary, obtain new testimony from a Vocational Expert, and re-determine Plaintiff's eligibility for benefits.

CONCLUSION

For the foregoing reasons, the Court recommends that the Commissioner's decision be REVERSED and the case be REMANDED for further administrative proceedings.

A proposed order accompanies this Report and Recommendation. Objections to this Report and Recommendation, if any, must be filed with the Clerk and served upon all parties to this suit no later than fourteen (14) days after the date on which this Report and Recommendation is signed. If no timely objections are filed, the Clerk shall note this matter for the earliest Friday after the deadline for objections, as ready for the Court's consideration. Failure to file objections within the specified time may affect the parties' right to appeal. If objections are filed, any response is due within fourteen (14) days after being served with the objections. A party filing an objection must note the matter for the court's consideration fourteen (14) days from the date the objection is filed and served. Objections and responses shall not exceed twelve pages.

DATED this 14th day of October, 2014.



 JOHN L. WEINBERG
 United States Magistrate Judge